IN THE COURT OF APPEALS OF THE STATE OF ALASKA

TERRI LORRAINE CHILCOTE

Appellant,

vs.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13031

Trial Court No. 3KN-16-01633CR

## NOTICE REGARDING SECTION I.C OF APPELLEE'S BRIEF

VRA CERTIFICATION. I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

This court recently sent out an order noting that the state had cited *Goins v. State,* No. A-8636, 2004 WL 1737602, at *4 & n.29 (Alaska App., Aug. 4, 2004) (unpublished), for its parenthetical description of *State v. Ailport*, 970 P.2d 1044, 1046-47 (Mont. 1998), but noting that the court had recently pulled up the *Ailport* decision and examined it and that the parenthetical description in *Goins* was incorrect. The court's notice caused the state to reevaluate this aspect of the case and the state now sets out the result of that reevaluation.

This case concerns the use of a prior Virginia conviction for driving under the influence of alcohol ("DUI") to enhance the sentence for an Alaska

Department of Law, Criminal Division
Office of Criminal Appeals
1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
Email: ocapleadings@alaska.gov

DUI offense and render Chilcote a second offender. Virginia uses a two-tier system for prosecuting misdemeanor offenses such as DUI, whereby an offender is first tried in a non-record district court in a bench trial, and if they are dissatisfied with the outcome there may appeal as of right to the circuit court and obtain a *de novo* jury trial. Chilcote waived her right to counsel in Virginia District Court and pled guilty and did not appeal to circuit court.

The state has operated (and continues to do so) under the assumption that as a matter of Alaska constitutional law, a guilty plea taken in a two-tier system would only be valid for use in enhancing the sentence for an Alaska offense if the defendant was expressly advised by the court of his right to a jury trial and knowingly waived it. The operative question is whether the Virginia District Court advised Chilcote of her right to appeal to circuit court and to obtain a *de novo* jury trial.

In section I.3 of the state's appellee's brief, the state cited *Goins* and relied on the presumption of regularity to argue that Chilcote was presumptively advised of these rights. Upon further reflection, that analysis is incorrect. The presumption of regularity is in essence a presumption that courts do everything that they are legally required to do in order to make their actions valid. However, the undersigned has researched the matter carefully and has found nothing in the Virginia Constitution, statutes, court rules, or case law that requires district court judges to advise defendants of

**Department of Law, Criminal Division**
Office of Criminal Appeals
1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
Email: ocapleadings@alaska.gov

their right to appeal to circuit court and obtain a *de novo* jury trial. Virginia's Benchbook for District Court judges, available on-line on the Virginia Court System's website, likewise does not even suggest such an advisement. The undersigned is likewise unaware of any United States Supreme Court precedent that holds that in a two-tier system, defendants must be advised of their right to appeal to a general-jurisdiction court and obtain a *de novo* jury trial. Although it seems intuitive that in such a system, defendants must be advised of their right to appeal and obtain a jury trial in order for a guilty plea to constitute a knowing waiver of the right to a jury trial, the lack of any source of authority that would be binding in Virginia District Court and compel such an advisement leads to the conclusion that it would stretch the presumption of regularity past its breaking point as a tool for interpreting events to presume that Chilcote was advised of these rights.

This court's notice also pointed out that the *Ailport* decision also pointed out that an affidavit or testimony from an attorney as to a judge's habitual practice with respect to things like taking guilty pleas or rights waivers could be relied on by courts in evaluating whether a presumption of regularity had been rebutted. The undersigned's research uncovered more case law to that effect, *i.e.*, courts are not bound to credit such evidence, but may if they examine it in light of other record evidence and conclude that it is credible and correct. The state sees no need to go beyond *Ailport* in terms of



**Department of Law, Criminal Division**
Office of Criminal Appeals
1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
Email: ocapleadings@alaska.gov

case citations and notes simply that this case law is consistent with Alaska's case law in situations such as guilty pleas and ineffective-assistance claims, where courts have relied on defense attorney's descriptions of their standard practices in situations where the defense attorney could not specifically recall advising his client of a particular point. Given that, it likewise makes sense that a court that was evaluating whether another court in a prior case accorded the defendant a particular right could rely on testimony or affidavits from the judge in the prior case or from attorneys who regularly practice before that judge as to her standard practices regarding advising and according defendants that right. The state thus concludes that Virginia DUI attorney Jonathan Fisher's testimony was probative as to whether Chilcote was advised of her right to appeal and have a *de novo* jury trial.

If the presumption of regularity is unavailing here and Fisher's testimony that Virginia district court judges rarely advise defendants of their right to appeal to circuit court and obtain a *de novo* jury trial is credited, then the state of the record is that there is no basis for a court to conclude that Chilcote was advised of these rights, and the Alaska District Court in Kenai was in error in so concluding.

The state has communicated with Chilcote's counsel, Assistant Public Defender Emily Jura, and she does not object to the state's filing of this response to the court's notice.



**Department of Law, Criminal Division**
Office of Criminal Appeals
1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
Email: ocapleadings@alaska.gov

Given the state's concession and retraction of its position in Section I.3 of its brief, the remaining dispositive issues in the case are those set out in Sections II-IV of the appellee's brief and the state continues to rely on the position set out in those sections of its briefing.

DATED December 16, 2019.

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: Timothy W. Terrell
Timothy W. Terrell (9011117)
Assistant Attorney General

**Department of Law, Criminal Division**
Office of Criminal Appeals
1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
Email: ocapleadings@alaska.gov

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

TERRI LORRAINE CHILCOTE

Appellant,

vs.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13031

Trial Court No. 3KN-16-01633CR

**CERTIFICATE OF SERVICE AND TYPEFACE**

I, Sylva M. Ferry, state that I am employed by the Alaska Department of Law, Office of Criminal Appeals, and that on December 16, 2019, I mailed a copy of the State's NOTICE REGARDING SECTION I.C OF APPELLEE'S BRIEF and this CERTIFICATE OF SERVICE AND TYPEFACE in the above-titled case to:

Emily L. Jura
Public Defender Agency
900 W. 5th Ave, Ste 200
Anchorage, AK 99501

I further certify, pursuant to App. R. 513.5, that the font used in the aforementioned documents is Century Schoolbook 13 point.

Sylva M. Ferry

**Department of Law, Criminal Division**
Office of Criminal Appeals
1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
Email: ocapleadings@alaska.gov